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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1055

W. T. STONE, WARDEN,
Petitioner,

vs.

LLOYD CHARLES POWELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

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The petitioner W. T. Stone, Warden of the Correctional Training Facility—Soledad, California, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 4, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A to this petition; the

unreported opinion of the United States District Court for the Northern District of California appears as Exhibit B and the unreported opinion of the California Court of Appeal as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether a state prisoner, who has been afforded a fair opportunity to raise his Fourth Amendment claims in the state courts and have them adjudicated by the state courts, may raise those same claims in collateral proceedings in the federal courts, which present no question regarding his innocence of the crime for which he is imprisoned.

2. Whether the exclusionary rule should apply to suppress the fruits of a reasonable search incident to an arrest for violation of a then-valid ordinance when the arresting officer acted upon probable cause.

3. Whether the Henderson, Nevada, vagrancy ordinance is constitutional.[1]

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[1]Although the validity of the Henderson, Nevada, vagrancy ordinance has tangential importance, we submit that a proper analysis of this case would make it unnecessary to reach this question.

4. Whether, if the murder weapon was erroneously admitted at respondent's trial, the error was harmless beyond a reasonable doubt.

STATUTE INVOLVED

The vagrancy ordinance of the City of Henderson, Nevada, reads:

"Every person is a vagrant who:

Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On June 6, 1968, Lloyd Charles Powell, petitioner and appellant below, respondent herein, was found guilty by a jury after trial in the Superior Court of San Bernardino County, California, of second degree murder (Calif. Pen. Code § 187). On June 10, 1968, he was sentenced to the California State Prison for the term prescribed by law, five years to life.

The judgment was affirmed by the California Court of Appeal in an unpublished opinion filed on October 7, 1969. (Appendix C).

Powell's petition to the California Supreme Court for a writ of habeas corpus was denied on July 1, 1970.

B. Proceedings in the Federal Courts:

On July 15, 1970, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. On September 17, 1970 the court entered an order denying the petition. An appeal from this order was dismissed by the United States Court of Appeals for the Ninth Circuit on July 15, 1971 pursuant to the stipulation of counsel. Respondent was given leave to file an amended petition in the district court.

An amended petition was filed in the district court on August 24, 1971. The jurisdiction of the district court was invoked under Title 28, U.S.C. § 2241. On February 8, 1972 the court entered an order denying the petition. A copy of the court's order is attached as Appendix B. On February 22, 1972 the court granted a certificate of probable cause to appeal.

On December 4, 1974 the United States Court of Appeals for the Ninth Circuit, which had jurisdiction in the matter under the provisions of Title 28, U.S.C. § 2253, filed an opinion reversing the judgment of the district court and remanding the cause to that court for further proceedings consistent with the court of appeals' opinion. The court of appeals' opinion is attached as Appendix A.

C. Statement of the Facts Adduced at Trial:

On the evening of February 17-18, 1968, Gerald Parsons and his wife Mary were working at the Bonanza Liquor Store in San Bernardino, California. At approximately midnight, Mr. Parsons was seated

in the rear office of the store while his wife was seated near the counter in the sales area of the store (RT 8-9).[2] Through a one-way glass, Mr. Parsons saw four men enter the store. Respondent Powell, one of these men, removed a bottle of wine from a shelf, put it inside his jacket, and closed the jacket. Parsons then approached him and questioned him about the wine. Parsons opened respondent's jacket, exposing a half-gallon bottle of wine. Respondent then struck Parsons in the mouth with his fist (RT 10-12, 29, 32).

The other men then started to walk out of the store. Parsons procured a .38 caliber revolver which he kept near the cash register. He then noticed that respondent had left the store (RT 12-13). However, respondent re-entered the store a short time later. Parsons pointed the gun at him as he advanced. He then raised the gun and fired a shot into the ceiling. Parsons then turned and placed the gun near an ice cream freezer. Respondent passed him and seized the gun. Parsons then heard an explosion, felt a bullet strike him in the wrist, and realized that he was bleeding (RT 16-17).

Parsons then ran for another gun which he kept in the office. At that time, he did not know where his wife was. A shot then rang out and she screamed. Parsons then heard the cash register bell ring. He returned from the office holding the second gun and observed Fred Buckley, one of the four men, leaning

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[2]The abbreviation "RT" refers to the Reporter's Transcript of respondent's trial.

over the cash register. He fired a shot at Buckley, who immediately ran out the door (RT 18-19). He then observed that his wife had been shot. Parsons last saw the first gun he handled in respondent's hand after he (Mr. Parsons) had placed it behind the ice cream freezer. He saw no one else handle the gun (RT 24).

Buckley testified that he observed respondent strike Parsons and saw Parsons obtain a gun from his wife. Parsons pointed the gun at respondent, who grabbed Parsons' arm. The gun then discharged. Respondent knocked the gun from Parsons' hand (RT 68-72). Buckley then saw respondent holding the gun and heard a shot fired. He observed Mrs. Parsons fall to the floor. He heard the gun discharge again and saw that Mr. Parsons had been shot in the arm (RT 85-86).

San Bernardino Police Officer Donald Covey took a statement from Buckley at the San Bernardino City Hall. Buckley stated that respondent had a bottle of wine hidden under his coat, that the manager spotted it, and that respondent then gained possession of the gun and "shot the manager's wife and, then, the manager" (RT 161-162).

John Chaney, another of respondent's companions, testified that as Parsons grabbed respondent's coat, "the wine fell to the floor and bust" (RT 164-166). Chaney stated that respondent then shoved Mrs. Parsons. Mrs. Parsons passed the gun to Mr. Parsons and "the scuffle started." The gun discharged during the scuffle, and Chaney ran from the store. The last time

Chaney saw the gun, it was in Parsons' hand, and respondent grabbed at it (RT 166-169).

At approximately 10:10 a.m. on February 18, 1968, Officer Edward Lattin of the Henderson, Nevada, Police Department, was on routine patrol in a marked police unit near the parking lot of a shopping center in the City of Henderson. He observed two men, one of whom was respondent, look at his police unit and quickly turn and walk in the opposite direction (RT 194-195). The men looked back toward the police vehicle several times and continued walking rapidly. The officer made a U-turn and approached them. They then split apart and began walking in opposite directions. The officer approached respondent from the rear and honked his horn. Respondent continued to walk toward the rear of a department store. The officer stopped his vehicle, jumped out, and asked him to halt. He then halted and turned around (RT 196-197).

The officer asked him whether he had any identification. He replied that his identification papers had been stolen. In response to further questions, respondent gave his name as Lloyd Charles Powell and his date of birth as January 6, 1947. The officer checked the name through the Henderson Police Department with negative results. Respondent stated that he had been staying with friends in Las Vegas but was unable to give their name or address (RT 197-198). He stated that he had been in Las Vegas "for the past few days" (RT 207). He also stated that he was en route to Michigan at that time (RT 199). Hender-

son is eight miles south of Las Vegas and a person going to Michigan from Las Vegas would proceed east and would not pass that way (RT 202, 208-209). The officer then arrested the respondent for violation of the Henderson Vagrancy Ordinance (RT 199). After the arrest, the officer searched respondent's person and found in the pocket of respondent's coat a pistol with six expended cartridges in the cylinder (RT 209-210). Chaney also testified that he was with respondent when they were arrested in Henderson (RT 171).

On the morning of February 18, 1968, during the post-mortem examination of the body of Mary Parsons, a lead slug was removed from the lung of the body. There was a high degree of similarity of individual striation markings observed during tests between the slug and bullets fired from the gun found on respondent's person. This similarity led Criminalist John Davidson to testify at respondent's trial that the bullets were fired from the same weapon (RT 235-240).

REASONS FOR GRANTING THE WRIT

A majority of the justices of this Court have stated that a state prisoner who has been afforded a fair opportunity in the state courts to raise and has adjudicated his Fourth Amendment claims, which claims do not present a question regarding his innocence, should not be allowed to raise the same claims in collateral proceedings in the federal courts. Nonetheless, the precedents which the lower federal courts

must follow are to the contrary. The writ should be granted to remedy this situation.

The exclusionary rule should not apply to suppress the fruits of a reasonable search incident to an arrest when the arresting officer had probable cause to believe that a then presumptively valid ordinance had been violated. Application of the exclusionary rule in any case to suppress relevant and trustworthy evidence is a high cost to society. That cost is not counterbalanced in this case by the need to deter the arresting officer, since he has done nothing which ought to be deterred. Nor is there a need to deter the legislative body which enacted the ordinance by suppression of the evidence. There is no showing that that body acted in bad faith or for an improper purpose. Similar ordinances were, at the time, in effect in many jurisdictions and had been upheld by the courts. Whatever deterrence deemed necessary could be accomplished by the less drastic means of invalidation of the ordinance and any convictions for its violation. Application of the exclusionary rule is an especially inappropriate remedy when, as here, the arrest occurred in one state for a violation of a local ordinance and the evidence was introduced in a trial in another state for a crime committed in that state. The writ should be granted to enable this Court to decide these important questions of constitutional law regarding application of the exclusionary rule and to settle the apparent conflict among the circuits as to whether the exclusionary rule should apply in such circumstances.

The writ should also be granted to enable the Court to consider the constitutionality of the ordinance in question, if it should find that respondent's Fourth Amendment claim was properly considered by the lower federal courts, and that the exclusionary rule should otherwise apply.

Finally, the writ should be granted to enable the Court to consider whether, in any event, any error here was harmless beyond a reasonable doubt.

ARGUMENT

I

A STATE PRISONER, WHO HAS BEEN AFFORDED A FAIR OPPORTUNITY IN THE STATE COURTS TO RAISE AND HAVE ADJUDICATED HIS FOURTH AMENDMENT CLAIMS, SHOULD NOT BE ALLOWED TO RAISE THOSE SAME CLAIMS IN COLLATERAL PROCEEDINGS IN THE FEDERAL COURTS WHEN THEY DO NOT PRESENT A QUESTION REGARDING HIS INNOCENCE.

At the present time, a Fourth Amendment claim may be asserted by a state prisoner in a habeas corpus petition filed in a United States District Court under the provisions of Title 28, U.S.C. § 2254. That claim must be considered, and the exclusionary rule applied, in precisely the same manner as a case involving a federal prisoner or a case which is before a federal court on direct review. *Schneckloth v. Bustamonte,* 412 U.S. 218, 251 (1973) (Concurring opinion of Powell, J.). The petitioner persenting such a claim need not allege that he is innocent of the crime for

which he is incarcerated or that the evidence he claims was improperly seized was unreliable. *Id.* at 256-258.

The above cited opinion, which was joined by the Chief Justice and by Mr. Justice Rehnquist, contains a comprehensive and persuasive argument in support of the proposition that, in cases where there is no constitutional claim bearing on innocence, "the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim" *Id.* at 266. Without attempting to elaborate on the reasoning of this opinion we urge the Court to adopt it as a statement of the proper scope of federal review of Fourth Amendment claims raised by state prisoners on habeas corpus. In doing so, this Court must of necessity overrule or limit some of its earlier precedents, e.g., *Kaufman v. United States,* 394 U.S. 217, 225-226 (1969).[3] This is an unavoidable necessity

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[3]A majority of this Court has, *sub silentio,* already limited *Kaufman.* In *Tollett v. Henderson,* 411 U.S. 258 (1973), this Court held that a state prisoner who entered a guilty plea could not, in a subsequent federal habeas corpus proceeding, raise independent claims regarding alleged deprivation of constitutional rights occurring prior to the plea. In *Mann v. Smith,* 488 F.2d 245 (9th Cir. 1973), *cert. denied,* 415 U.S. 932, the United States Court of Appeals for the Ninth Circuit applied *Tollett* to preclude federal habeas corpus review of a California prisoner's drug conviction, founded on his guilty plea. Prior to entering his plea, the defendant had fully litigated the constitutional propriety of the seizure of the drugs in the California courts and had petitioned this court for a writ of certiorari. *See* California Penal Code section 1538.5; *Mann v. Superior Court,* 3 Cal.3d 1, 88 Cal.Rptr. 380 (1970), *cert. denied,* 400 U.S. 1023. *In dictum,* the Court suggested that the result would be the same even if the defendant had followed an alternate course of procedure under

since, although a majority of this Court is on record as favoring such limitation or overruling of these precedents,[4] they still guide the lower federal courts and will continue to do so until they are forthrightly and finally overruled or limited. This case is a classic illustration of the shortcomings of the present rule and a particularly appropriate one for a grant of a writ of certiorari and, ultimately, adoption by this Court of the concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte.*

California law and reserved presenting the issue to the California appellate courts until after his plea of guilty. *See* California Penal Code section 1538.5 (m); *accord, Sanders v. Craven,* 488 F.2d 478 (9th Cir. 1973); *contra, United States ex rel. Newsome v. Malcolm,* 492 F.2d 1166, 1171 (2nd Cir. 1974), *cert. granted sub nom. Lefkowitz v. Newsome,* 417 U.S. 967; *United States ex rel. Daneff v. Henderson,* 501 F.2d 1180 (2nd Cir. 1974).

[4]In *Schneckloth v. Bustamonte, supra,* at 249, Mr. Justice Blackmun, in a separate concurring opinion, noted his agreement with the views expressed in the dissenting opinion of Justices Harlan and Stewart in *Kaufman, supra,* at 242-243, and his agreement with "nearly all" of the opinion of Justice Powell, the Chief Justice, and Justice Rehnquist in *Schneckloth.* He refrained from joining this latter opinion because he found it unnecessary to reconsider *Kaufman* in order to decide the *Schneckloth* case.

Mr. Justice Stewart, writing the opinion of the Court in *Schneckloth,* also found it unnecessary to resolve this question in that case. *Id.* at 249, n. 38. However, in *Kaufman, supra,* at 242-243, he joined the dissenting opinion of Mr. Justice Harlan, which concluded that there should be no collaterial review of Fourth Amendment claims if the defendant had the opportunity to present the claim and have it determined in direct review proceedings. In *Chambers v. Maroney,* 399 U.S. 42, 54-55 (1969), Mr. Justice Stewart reiterated this position in a separate concurring opinion.

II

THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO SUPPRESS THE FRUITS OF A SEARCH INCIDENT TO AN ARREST FOR VIOLATION OF A THEN-VALID ORDINANCE WHEN THE ARRESTING OFFICER HAD PROBABLE CAUSE TO BELIEVE THAT THE ARRESTEE HAD VIOLATED THE ORDINANCE.

The question of whether an exclusionary rule should ever be applied has been and probably will remain a fertile field for judicial and scholarly dispute for many years. Despite this, it is difficult to articulate the rule concisely. Generally, it renders inadmissible any evidence seized in violation of a person's constitutional rights. *See* Kaplan, *The Limits of the Exlusionary Rule,* 26 Stan. L. Rev. 1027, 1029 (1974). Yet the rule is subject to several exceptions and limitations. It applies only when the rights of the particular defendant, and not a third person, have been violated. *Brown v. United States,* 411 U.S. 223 (1973); *Alderman v. United States,* 394 U.S. 165 (1969). It does not apply when illegally seized evidence is used only for impeachment. *Walder v. United States,* 347 U.S. 62 (1954). It does not necessarily apply to exclude evidence which would not have come to light but for the illegal conduct of government agents. Such evidence is still admissible if it has not been developed by exploitation of the "primary illegality." *Wong Sun v. United States,* 371 U.S. 471 (1963). It will not require, on collateral attack, the setting aside of a guilty plea entered on the advice of competent counsel, even though there remains some questions whether the defendant's Fourth Amendment rights

have been violated and whether the resulting seizure of evidence contributed to the decision to plead guilty. *See* cases collected at note 3, *supra.*

Several justifications for the rule have been advanced. The one most often stated is that: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States,* 364 U.S. 206, 217 (1960); *see also, Terry v. Ohio,* 392 U.S. 1, 12-13, 29 (1968); *United States v. Calandra,* 414 U.S. 338, 345 (1974).

The Court of Appeal in the instant case recognized a second justification for the rule—"the imperative of judicial integrity." *See, Elkins v. United States, supra,* at 222-223; *Terry v. Ohio, supra,* at 12-13. Under this theory, courts should not be made a party to lawless invasions of the constitutional rights of citizens and should exclude evidence so obtained lest its admission be understood as approval of the use of lawless means of obtaining evidence. *Terry, supra,* at 13. But even this "judicial imperative" is not an absolute since the courts have not adopted a theory of the exclusionary rule based on a direct connection between violation of an individual's Fourth Amendment rights and application of the exclusionary rule. Kaplan, *op. cit. supra,* at 1030. Rather, this "judicial imperative" appears to be a function of the primary purpose of deterrence of unreasonable, and hence illegal, police conduct by withholding the approval of the courts from evidence so obtained.

Indeed, an absolute approach would be at odds with the very language of the Fourth Amendment itself. That Amendment does not proscribe all searches and seizures—only those that are "unreasonable" and hence unconstitutional. *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 357 (1931). This standard of reasonableness is, of necessity, an objective one. Thus, for example, the fact that an arrest is based on a reasonable and good faith mistake of fact will not require suppression of the fruits of a search incident to that arrest. *Hill v. California,* 401 U.S. 797 (1971).

Rather, application of the exclusionary rule requires a balancing process. Thus, even evidence illegally seized as a result of unreasonable government conduct may sometimes be admitted. "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra, supra,* at 348. The Court in *Calandra* used the standing requirement as an example of "the balancing process implicit in this approach." *Id.*

Applying these principles, there is absolutely no justification for application of the exclusionary rule in the instant case because there was nothing to deter. The only police conduct involved was an arrest made with probable cause to believe a local ordinance was

being violated and a reasonable incidental search of the arrestee.[5] In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court faced a similar fact pattern and an analogous legal question. In that case the plaintiff brought an action under the Civil Rights Act of 1871 (42 U.S.C. § 1983) alleging that some of the defendants,

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[5]There is no theoretical inconsistency in the proposition that, assuming *arguendo* the ordinance in question is unconstitutionally vague, a police officer may still have reasonable cause to believe that the ordinance has been violated. A California court of appeal recently addressed the constitutionality of a nearly identical California statute. Of particular interest is its comparison of the operative provisions of the statute with the standards of *Terry v. Ohio, supra:*

> "The statute is asserted to be unconstitutionally vague. Yet under *Terry v. Ohio,* [*supra*], a peace officer may detain, frisk and interrogate a person whose conduct raises a reasonable suspicion of criminal activity. The standard set out in *Terry* for the exercise of this authority is comparable to the one that brings [the statute] in play. Under *Terry* a peace officer is entitled to act when the information available to him warrants the belief by a man of reasonable caution that official intrusion is appropriate [*Terry, supra,* at 20-21]. Under [the statute] a peace officer is entitled to act when the surrounding circumstances indicate to a reasonable man that the public safety demands identification. We see no essential difference between these two formulations. Each amounts to what Justice Harlan has termed 'articulable suspicion less than probable cause.' [*Terry, supra, at page* 31, concurring opinion of Harlan, J. ——].
>
> Neither is subject to the infirmity of vagueness. Both justify the limited intrusion of temporary detention, followed in the one case by frisk and in the other by request for identification. (Parenthetically we observe that frisk involves greater intrusion into personality than does request for identification.)" *People v. Solomon,* 33 Cal.App.3d 429, 435, 108 Cal.Rptr. 867, 870-71 (1973).

The facts surrounding the arrest have been stated in our Statement of Facts, *supra,* and in the Ninth Circuit's opinion (Appendix A, at page 4, n.2). We submit that an officer confronted with these facts could properly request Powell to identify himself and account for his presence. After hearing the self-contradictory and inherently improbable explanation Powell offered, he had probable cause to believe that he had violated the ordinance and could act accordingly.

police officers, had arrested them under a Mississippi statute later declared to be unconstitutional by this Court. This Court held that the officers could not be held liable in damages for acting under a statute that they reasonably believed was valid, but which would later be held unconstitutional, since they were not required to predict the future course of constitutional law. We, of course, recognize that *Pierson* was a civil action in damages against the arresting officers and not a collateral attack on a conviction. Nonetheless, we submit that the general principle of *Pierson*—that the police should not be punished for making an arrest based on probable cause to believe that a statute had been violated in their presence, when they reasonably and in good faith believe that the statute is valid, even though it may later be decided that it was not—should apply to this case. In short, there is no need or reason to deter the sort of reasonable and proper conduct engaged in by the arresting officer in this case.

The Ninth Circuit attempted to parry this argument by stating that it was inconsistent with a "substantial line" of this Court's cases, e.g., *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Coolidge v. New Hampshire,* 403 U.S. 443, 449-453 (1971); *Sibron v. New York,* 392 U.S. 40, 61-62 (1968); *Berger v. New York,* 388 U.S. 41 (1967). Each of these cases is distinguishable because the statutes involved therein, which were relied on by the arresting officers, dealt directly with the standards and procedures governing searches and did not attempt to define a substantive

crime. In short, each involved legislative encroachment upon Fourth Amendment rights. In such cases, the good or bad faith of the police officers enforcing the statute was irrelevant. The Ninth Circuit dismissed this distinction in a single, cryptic sentence, observing that although, "in form the Henderson ordinance purports to create a substantive offense, in effect it negates the requirement of probable cause, basic to the Fourth Amendment." This, however, overlooks the fact that statutes defining a substantive offense of vagrancy, although phrased in many different ways, have been a part of the common law since the enactment of the Statutes of Labourers by Parliament in 1349 and 1350, more than four centuries prior to the adoption of the Fourth Amendment. *See Papachristou v. City of Jacksonville,* 405 U.S. 156, 161-162 (1973); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 Calif.L.Rev. 557, 560-561 (1961); *See also Note, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. Rev. 102 (1962). Indeed, all of our states have recognized a substantive offense of vagrancy. *Sherry, op. cit. supra,* at 557, n.1. Thus, the court should have addressed the question of whether the arresting officer had probable cause to believe that the ordinance was being violated and should not have assumed or decided that the ordinance itself attempted to define "probable cause" in the abstract.

The court bypassed the question of whether the officer had probable cause to arrest and found that

the exclusionary rule should be applied in this case since, although "the public interest may dictate that the police not be deterred from enforcing statutory law even when it mandates unconstitutional conduct . . . the public interest is served by deterring legislators from enacting such statutes." We submit that such deterrence could be accomplished by invalidating the ordinance and any convictions under it. There is no hint of bad faith or oppressive purpose on the part of the local body which enacted the ordinance which would justify a broader sanction. Indeed, the two cases on which the court placed its greatest reliance (*Papachristou v. City of Jacksonville, supra* and *United States ex rel. Newsome v. Malcolm, supra*) were not decided until several years *after* the arrest in this case. The record is silent as to the date of the enactment of the ordinance. However, in 1960, Professor Sherry, perhaps the leading scholar on the subject, proposed the adoption of a similar statute. *Sherry, op. cit. supra,* at 570-571. In 1967 an ordinance identical to the ordinance in question was upheld as constitutional by the California Court of Appeal. *People v. Weger,* 251 Cal.App.2d 584, 59 Cal.Rptr. 661 (1967) *cert. den.* 387 U.S. 1047. Enactment (or failure to repeal) an ordinance under such circumstances simply is not the sort of legislative conduct which needs to be deterred by a sanction more stringent than the invalidation of any convictions under it. The crowning irony in the application of the exclusionary rule in this case is that the legislators in the Henderson, Nevada City Council will hardly

be deterred by invalidation of a conviction for a murder committed in California.

Indeed, other cases, which the court declined to follow, have reached precisely the opposite result. In *United States v. Kilgen,* 445 F.2d 287 (5th Cir. 1971), the defendant was arrested for vagrancy under an ordinance later held unconstitutionally void for vagueness and overbreadth (*United States v. Kilgen,* 431 F.2d 627 [5th Cir. 1970]). Specifically, he was arrested for violating that part of an ordinance which prohibited "wandering and strolling about from place to place with no lawful purpose or objective" 431 F.2d at 628. On rehearing, the court upheld its earlier decision regarding the unconstitutionality of the statute, but held that Kilgen's post-arrest confession to another charge should not be suppressed.

> "Had Kilgen been convicted for vagrancy, that conviction would necessarily have been reversed when the court held the vagrancy ordinance unconstitutional. But overturning a conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good faith belief in the validity of the statute. *See Pierson v. Ray,* supra. In the case at hand, the police arrested Kilgen for violating an ordinance which the Supreme Court of Florida and the federal district court, although in disagreement with this court, upheld as constitutional. There is no hint of any abusive police conduct in effecting the arrest or in obtaining the evidence used at the trial for another crime. Neither is there any doubt as to the reliability of the evidence which prompted the conviction. In short, this is a clear case of police officers who, with the utmost regard for the rights of the defendant, carried out their sworn duty to make an arrest and obtain evidence under the law as it then existed. No legitimate interest would be served by excluding the confession to the separate crime . . . because we now find the vagrancy ordinance invalid." 445 F.2d at 289 (footnotes omitted).

In *United States v. Dameron,* 460 F.2d 294 (5th Cir. 1972), *cert. denied,* 409 U.S. 882, overruled on other grounds, 488 F.2d 724 (5th Cir. 1974), the defendant was stopped and arrested for violation of a local reckless driving ordinance and then consented to a search, which uncovered a gun. The court held that:

> "Appellant's frontal assault on the ordinance on vagueness grounds, *see Papachristou v. Jacksonville,* [*supra*], while substantial, is ineffectual. Regardless of the outcome of a direct challenge on vagueness grounds, on which we express no opinion, if appellant's arrest was made in the good faith enforcement of a *then* valid ordinance, a subsequent holding of facial invalidity does not of itself taint appellant's consent to search." *Id.* at 295 (Citations omitted).

Accord *Hamrick v. Wainwright,* 465 F.2d 940 (5th Cir. 1972) (dictum); But *cf. United States ex rel. Newsome v. Malcolm, supra* (holding search to be constitutionally defective because arrest made for violation of a statute which "substituted a mere suspi-

cion for probable cause as the basis for arrest.")[6] *Hall v. United States,* 459 F.2d 831 (D.C. Cir. 1972) (en banc) (holding exclusionary rule applicable to the particular case because the defendant was the first litigant to prevail on a claim that the statute under which he was arrested was constitutionally defective).

We submit that this conflict between the circuits is yet another compelling reason why the writ of certiorari should be granted.

III

THE HENDERSON, NEVADA, VAGRANCY ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE.

The court of appeal held that the ordinance in question was unconstitutional because it was void for vagueness and encouraged arbitrary and erratic arrests and convictions. This Court has consistently held that lack of precision itself is not offensive to the requirements of due process. Impossible standards are not required. What is required is that the language of the statute conveys sufficiently definite warning as to the conduct proscribed when measured by common understanding and practices. *Miller v. California,* 413 U.S. 15, 27, n.10 (1973); *Roth v. United States,* 354 U.S. 476, 491 (1957); *United States v. Petrillo,* 332 U.S. 1, 7-8 (1947). A statute must be sufficiently

[6]This court granted certiorari in the *Newsome* case on the issue of whether the defendant could seek federal habeas corpus relief at all in view of his guilty plea in the state court. 417 U.S. 967.

explicit to inform those subject to it what conduct on their part will render them liable to its penalties. *Connally v. General Construction Co.,* 269 U.S. 385 (1926). Even if a penal statute is framed so as to require a jury upon occasion to determine a question of reasonableness, it is not too vague to serve as a practical guide to permissible conduct. *United States v. Ragen,* 314 U.S. 513 (1942).

A statute must not, however, forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language of the statute too ambiguous to define a criminal offense. *Miller v. California, supra; United States v. Petrillo, supra.* If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States v. Harriss,* 347 U.S. 612, 618 (1954). This Court has often expressed its intention to go far to uphold statutes that deal with offenses difficult to define when they are not intertwined with limitations on free expression. *Winters v. New York,* 333 U.S. 507 (1948); *see also, Federation of Labor v. McAdory,* 325 U.S. 450 (1945); *Porter v. Investors Syndicate,* 286 U.S. 461 (1932). In determining the sufficiency of the notice afforded by a statute, the statute must of necessity be examined in the light of the conduct

with which the defendant is charged. *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963).

The similarity of the first element of the offense defined by the Henderson ordinance to the operative provisions of *Terry v. Ohio, supra,* has been discussed at n.5, above. The gravamen of the offense is the refusal to identify oneself and to account for one's presence when requested to do so *(compare* the ordinance in *Papachristou v. City of Jacksonville, supra,* which had no such requirement). As was noted above, a statute will not be struck down as unconstitutionally vague if the defendant's conduct is plainly within it.

The self contradictory and inherently improbable explanation given by the respondent in this case certainly could not fit within any reasonable construction of the language of the ordinance. Accordingly, he may not complain that, as to him, that ordinance was void for vagueness. *See Miller v. California, supra; Palmer v. City of Euclid,* 402 U.S. 544, 545 (1971). The final element of the ordinance, requiring the application of a standard of reasonableness under the circumstances is not unconstitutionally vague. *United States v. Ragen, supra.*[7]

[7]The constitutionality of a similar California statute has repeatedly been upheld by the California courts. *See People v. Solomon,* 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973); *People v. Taylor,* 6 Cal.App.3d 51, 85 Cal.Rptr. 497 (1970); *People v. Weger,* 251 Cal. App.2d 584, 59 Cal.Rptr. 661 (1967); *cert. denied,* 389 U.S. 1047; *People v. Bruno,* 211 Cal.App.2d Supp. 855, 27 Cal.Rptr. 458 (1962).

IV

EVEN IF THE EVIDENCE WERE ERRONEOUSLY ADMITTED, SUCH ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Chapman v. California, 386 U.S. 18 (1967) held that federal constitutional error may be harmless if the court is able to declare a belief that it was harmless beyond a reasonable doubt. The California court of appeal applied this test and held that any error regarding the admission of the gun into evidence or the receipt of testimony concerning the seizure of the gun was harmless beyond a reasonable doubt. The district court agreed with this conclusion. The Ninth Circuit disagreed. We submit that this Court should reach the same conclusion as did the lower courts.

As is shown by our statement of facts, *supra,* there was no doubt that respondent was present in the liquor store at the time Mrs. Parsons was shot. There was no doubt as to his identity. Nor was there any doubt that he had the murder weapon in his hand during the quarrel with Mr. and Mrs. Parsons. Mr. Parsons testified that respondent seized the gun and shot him. A few seconds later, he heard another shot and heard his wife scream. He then observed that she had been shot. He last saw the gun in respondent's hand, while he was in the store. The gun was not found in the store. Witness Buckley saw him holding the gun and saw Mr. and Mrs. Parsons get shot. His testimony differed from that of Mr. Parsons only in that he testified that the shootings occurred in reverse order (Mrs. Parsons was shot before Mr. Parsons). Witness Mercer observed the struggle but left before the

shots were fired. Witness Chaney also observed respondent in the Parsons' store and saw him grab at the gun in Mr. Parsons' hand. Perhaps the most eloquent testimony to the fact that respondent succeeded in wresting the gun from Mrs. Parsons is the fact that Mr. Parsons received a gunshot wound on his right wrist. We submit that this evidence can give rise to no reasonable conclusion other than that respondent had exclusive possession of the weapon and fired the shots that killed Mrs. Parsons and wounded her husband. Accordingly, we submit that any error with reference to the gun was clearly harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, February 21, 1975.

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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 72-1543

Lloyd Charles Powell, Plaintiff-Appellant,
vs.
W. T. Stone, Warden, Defendant-Appellee.

[December 4, 1974]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: MERRILL and BROWNING, Circuit Judges, and TAYLOR,* District Judge.

BROWNING, Circuit Judge:

Late one night appellant and three companions became involved in an altercation in the Bonanza Liquor Store in San Bernardino, California. Mary Parsons, wife of the manager, Gerald Parsons, was shot and killed. Ten hours later, appellant was arrested in Hen-

*Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

derson, Nevada, for violation of a local vagrancy ordinance. Testimony regarding this arrest and the discovery of the murder weapon in appellant's jacket pocket, in a search incident to the arrest, was introduced in appellant's subsequent trial for murder in the Superior Court of San Bernardino County. The California trial court rejected appellant's objection that the evidence should have been excluded because the Henderson vagrancy ordinance was unconstitutional and the arrest and search incident thereto were therefore illegal. Appellant was convicted of second-degree murder.

The conviction was affirmed by the California District Court of Appeal. That court did not pass upon the constitutionality of the Henderson ordinance or the legality of the arrest and search; it affirmed on the ground that admission of the evidence, if error, was harmless under the test of *Chapman v. California,* 386 U.S. 18 (1967). The Supreme Court of California denied appellant's petition for habeas corpus.

Appellant then filed the present petition for habeas corpus in the federal district court. The district court denied the petition. The court did not reach the constitutionality of the Henderson vagrancy ordinance. It agreed with the California District Court of Appeal that the admission of the evidence was harmless beyond a reasonable doubt. It also held that even if the Henderson ordinance were determined to be unconstitutional, the exclusionary rule should not be applied to bar admission of the fruits of the search incident to the otherwise valid arrest.

For reasons that will be set out later, we are unable to agree that admission of the evidence was harmless. We must therefore consider whether its admission was error. We conclude that it was.

I

We turn first to the constitutionality of the Henderson vagrancy ordinance. The ordinance reads:

> Every person is a vagrant who:
>
> Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

This ordinance, like the vagrancy ordinance held unconstitutional in *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972), "is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *United States v. Harriss,* 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama,* 310 U.S. 88; *Herndon v. Lowry,* 301 U.S. 242."

The offense under the Henderson ordinance has three elements: (1) "loiter[ing] or wander[ing] upon the streets . . . without apparent reason or business," (2) "refus[ing] to identify himself and to account for his presence," and (3) "surrounding circumstances

. . . such as to indicate to a reasonable man that the public safety demands such identification."

The language of the first element is the same in substance as the language of the Jacksonville ordinance held invalid in *Papachristou:* "[P]ersons wandering or strolling around from place to place without any lawful purpose or object . . . shall be deemed vagrants." 405 U.S. at 156-57 n. 1.[1]

This language, the Supreme Court held, fails to give fair notice of the prohibited conduct to a possible offender, encompasses innocent activity that is part of the amenities of life in a free society, provides no guidelines by which enforcement authorities might distinguish between innocent and unlawful conduct, allows arrest and conviction on suspicion, places almost unfettered discretion in the hands of the police, and invites arbitrary and erratic application. If there is any material difference between the Jacksonville ordinance and the first element of the Henderson ordinance, the latter is more subject to these criticisms than the former.

The remaining two elements of the Henderson ordinance do not add significant specificity.

Assuming the phrase "to identify himself" is clear enough, one who properly identifies himself when asked would still violate the ordinance if he refused upon request "to account for his presence"—a phrase that reflects all of the deficiencies and is subject to all

[1]A similarly phrased Arizona statute was held plainly unconstitutional in Anderson v. Nemetz, 474 F.2d 814, 817 (9th Cir. 1973).

of the abuses that underlie the ruling in *Papachristou. See Ricks v. District of Columbia,* 414 F.2d 1097, 1104-05 (D.C. Cir. 1968); *Baker v. Bindner,* 274 F.Supp. 658, 664 (W.D. Ky. 1967); *United States v. Margeson,* 259 F.Supp. 256, 268-69 (E.D. Pa. 1966). The statutes involved in these three cases predicated criminality upon the offender's failure to give a "good" or "satisfactory" account of his presence. This condition is not explicitly stated in the Henderson ordinance, but it is clearly implied. Appellant offered an explanation of his conduct; he was arrested because the officer did not believe it.[2]

The third element of the offense under the Henderson ordinance—that "surrounding circumstances . . .

[2]The arresting officer saw appellant and a companion walking across a parking lot in a shopping center. It was 10 o'clock Sunday morning. The adjacent stores were open and there were cars on the lot. The arresting officer knew nothing of the shooting in California the night before. There is nothing to suggest that he connected appellant with any other specific crime. He testified that appellant and his companion "appeared" to look at the police car, then "quickly" turned and walked in the opposite direction. They walked "in a rather rapid manner," occasionally looking back. When the police car turned and followed, the two men separated and walked in different directions. The officer followed appellant, and honked the patrol car horn. Appellant did not stop. The officer got out of his car and said, "Wait a minute." Appellant stopped. The officer asked if appellant had any identification. Appellant said he did not, that it had recently been stolen. The officer asked his name; appellant gave it. The officer asked appellant where he was staying. Appellant responded that he was staying with friends in Las Vegas (approximately eight miles north of Henderson), but he could not provide the name or address. The officer asked appellant where he was going. Appellant said he was en route to Michigan; the officer testified that Henderson is south of Las Vegas and not east on the most direct road to Michigan. He arrested appellant because appellant "had no real answer as far as where he had been staying nor the friends that he was with nor could [he] give me a reason for being in the Henderson area. . . ." After the arrest the officer conducted the search complained of.

indicate to a reasonable man that the public safety demands such identification"—cannot save the ordinance. Whether "public safety demands . . . identification" is far too amorphous a standard to provide either reasonable notice to the possible offender (who, indeed, may not be aware of the circumstances that implicate the public safety), or a sufficiently specific standard to guide the police. A similar, but less vague, limitation ("circumstances which justify suspicion that [a person] may be engaged or about to engage in crime") was found constitutionally inadequate in *United States ex rel. Newsome v. Malcolm,* 492 F.2d 1166, 1173 (2d Cir. 1974).

From this analysis, it is clear that the Henderson vagrancy ordinance is incompatible with Fifth Amendment due process notice requirements incorporated in the Fourteenth Amendment. It should be emphasized that the ordinance is also incompatible with incorporated Fourth Amendment principles. A vagrancy ordinance of this kind "conflict[s] with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause." *United States ex rel. Newsome v. Malcolm, supra,* 492 F.2d at 1172. *See also Papachristou, supra,* 405 U.S. at 169-70; *Hall v. United States,* 459 F.2d 831 (D.C. Cir. 1972) *(en banc), noted in* 47 N.Y.U. L. Rev. 595 (1972) *and* 18 Vill. L. Rev. 117 (1972).

As these authorities reflect, such a vagrancy ordinance subverts the "probable cause" requirement in two ways. It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature

could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense. Police are duty-bound to investigate suspicious conduct, and founded suspicion will support an investigative stop and inquiry. *Wade v. United States,* 457 F.2d 335, 336 (9th Cir. 1972). But more is required to justify arrest. *Henry v. United States,* 361 U.S. 98, 101, 104 (1959).[3]

The "probable cause" requirement is negated by such vagrancy ordinances in a second way. Their language is so general and vague, the elements of the offense so obscure, that they afford no reasonable criteria by which an officer may determine whether the ordinance has or has not been violated. Because a man of reasonable caution cannot form a reasonable belief as to whether such an ordinance has been violated, an officer cannot "gauge justification for [vagrancy] arrests consistently with Fourth Amendment principles." *Hall v. United States, supra,* 459 F.2d at 837.

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[3]It is not contended that the search in this case could be justified as a protective search for weapons; or that prior to the search the arresting officer had no reason to believe appellant was "an armed and dangerous individual." Terry v. Ohio, 392 U.S. 1, 27 (1968).

II

The question remains whether the evidence obtained in the search incident to appellant's arrest under the unconstitutional Henderson ordinance should have been excluded at his murder trial.

Appellee argues that the purpose of the exclusionary rule is to discourage objectionable police conduct, and this purpose would not be advanced by excluding the fruits of a search that appeared to be lawful when made. The crux of the contention is that the public interest is not served by deterring officers from enforcing a statute that is apparently valid. Appellant relies upon the principle underlying the holding in *Pierson v. Ray,* 386 U.S. 547 (1967), that police officers cannot be held liable for damage for an arrest made in good faith and on probable cause under a statute they reasonably believed to be valid.[4]

Extension of *Pierson v. Ray* to allow admission of evidence obtained in the search incident to appellant's arrest for violation of an ordinance invalid under the Fourth Amendment would be inconsistent with a substantial line of Supreme Court authority. *See, e.g., Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Coolidge v. New Hampshire,* 403 U.S. 443, 449-53 (1971); *Sibron v. New York,* 392 U.S. 40, 61-62 (1968); *Berger v. New York,* 388 U.S. 41 (1967).

[4]Appellee also contends that failure to apply the rule should not afford a basis for collateral attack upon a state conviction in federal court. He submits the contention "for the record," recognizing that it is contrary to recent precedent. E.g., Whiteley v. Warden, 401 U.S. 560 (1971); Mancusi v. DeForte, 392 U.S. 364 (1968); Ramon v. Cupp, 423 F.2d 248 (9th Cir. 1970). The Supreme Court explicitly approved the doctrine in Kaufman v. United States, 394 U.S. 217, 225 (1969), citing it as one basis for holding that failure to exclude evidence obtained in violation of the defendant's Fourth Amendment rights is a ground for collateral attack upon a *federal* conviction.

The issue was before the Court, but was not reached, in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

In each of these cases except *Sibron* the exclusionary rule was applied to bar evidence obtained in good-faith reliance upon a statute later held to violate Fourth Amendment principles. In *Almeida-Sanchez,* marijuana found in a search of defendant's automobile without a warrant, probable cause, or consent was suppressed although a federal statute authorized government agents to conduct such searches for aliens within a reasonable distance of the border. In *Coolidge,* evidence obtained in an automobile search conducted by a police officer pursuant to a warrant issued by the Attorney General of the state was suppressed because the warrant was not issued by a "neutral and detached magistrate," as required by the Fourth Amendment, even though a state statute authorized the issuance of the warrant. In *Berger,* evidence obtained by electronic eavesdropping authorized in accordance with the state statute was excluded because the statutory procedures did not satisfy Fourth Amendment requirements that a warrant be issued only on showing that a specific crime has been or is being committed, and "particularly describing the place to be searched, and the persons or things to be seized." In *Sibron,* evidence obtained in a search assertedly conducted in accordance with a state "stop-and-frisk" statute was excluded on Fourth Amend-

ment grounds with an express disclaimer by the Court of any need to inquire whether the state statute was valid or had been complied with.

The statutes involved in these cases dealt directly with the standards and procedures governing searches. But as noted earlier, though in form the Henderson ordinance purports to create a substantive offense, in effect it negates the requirement of probable cause, basic to the Fourth Amendment.

The exclusionary rule was applied to bar evidence obtained in searches incident to good-faith arrests under invalid vagrancy statutes in both *United States ex rel. Newsome v. Malcolm, supra,* 492 F.2d at 1174, and *Hall v. United States, supra,* 459 F.2d at 841. The reason suggested in *Newsome* is that the search-incident-to-arrest exception is justified only because probable cause is required for the arrest, and since this essential Fourth Amendment safeguard is lacking in arrests under a vagrancy ordinance, searches incident to such arrests are also unsupported by probable cause and are therefore invalid. This explains the invalidity of the search, but it does not offer a rationale for the exclusion of the evidence. Neither does the opinion in *Hall. Hall* found it unnecessary to decide whether the exclusionary rule should apply to the fruits of all searches incident to arrests under unconstitutional statutes. The Court concluded that at least, for the reasons suggested in *Stovall v. Denno,* 388 U.S. 293, 301 (1967), the exclusionary rule should be applied where the defendant was the first to success-

fully challenge a search on the new constitutional ground, as was the case in *Hall.* In view of *Papachristou, Newsome,* and *Hall,* however, it is far from clear that appellant could qualify as a constitutional innovator.

Two considerations clearly support the application of the exclusionary rule to this case. It may not be appropriate to fault an officer for making an arrest in mere suspicion, contrary to well-established Fourth Amendment principles, when such an arrest is authorized by a statute *(but see* Note, *supra,* 18 Vill. L. Rev. at 121 n. 33),[5] but the same cannot be said with respect to those who enact such a statute authorizing such unconstitutional searches. The public interest may dictate that the police not be deterred from enforcing statutory law even when it mandates unconstitutional conduct, but the public interest is served by deterring legislators from enacting such statutes. *See* Note, *supra,* 47 N.Y.U. L. Rev. 602, 604. In the second place, application of the exclusionary rule "serves another vital function—'the imperative of judicial integrity.' *Elkins v. United States,* 364 U.S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Terry v. Ohio, supra,* 392 U.S. at 12-13.

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[5]The fact that the officer acted in good faith does not validate the search or dictate admission of the evidence seized. Beck v. Ohio, 379 U.S. 89, 97 (1964); Henry v. United States, 361 U.S. 98, 102 (1959). *See also* Whiteley v. Warden, 401 U.S. 560, 568 (1971).

The holdings in *United States v. Kilgen,* 445 F.2d 287, 289 (5th Cir. 1971), and *United States v. Dameron,* 460 F.2d 294 (5th Cir. 1972), are not to the contrary. Both involved consent searches rather than searches incident to arrest. They hold only that invalidation of the underlying substantive statute does not vitiate the consent to search.

III

Finally, we state the basis for our conclusion that admission of the evidence obtained in the unlawful search was not harmless beyond a reasonable doubt.

Shortly after appellant and his three companions entered the liquor store, Mr. and Mrs. Parsons saw appellant conceal a bottle of wine under his coat. They demanded payment. Appellant denied having the wine. Mrs. Parsons gave her husband a gun, which Mr. Parsons pointed at appellant. A struggle ensued involving appellant, Mr. Parsons and Mrs. Parsons. Three shots were fired: the first, admittedly fired by Mr. Parsons, went into the ceiling; the second and third wounded Mr. and Mrs. Parsons, Mrs. Parsons fatally. Mr. Parsons testified that after the first shot was fired appellant obtained control of the gun and Mr. Parsons ran to get another, leaving appellant and one of his companions, Fred Buckley, with Mrs. Parsons. Mr. Buckley first testified that appellant and Mr. Parsons were "wrestling with the gun" and that he "can't rightly say who had the gun" when the fatal shot was fired; he later testified that he "believed" appellant had the gun.

The defense submitted to the jury all of the theories suggested by the facts, including self-defense, justifiable homicide, accident, and that the fatal shot was not fired by appellant.

In rebuttal the prosecutor made effective use of the testimony regarding the Nevada arrest and search. He refuted the theory of accident by demonstrating to the jury the time and effort required to pull the trigger and discharge the murder weapon, and by inviting the jury to try it themselves, commenting, "It doesn't fire accidentally and it doesn't hit people accidentally either." The prosecutor used appellant's possession of the gun in responding to the defense argument that in order to find that appellant shot the victim the jury would have to rely entirely on the testimony of Mr. Buckley, an accomplice whose credibility had been severly attacked. The prosecutor noted Mr. Parsons' testimony that when he returned to the room and found his wife shot, Mr. Buckley alone was present; and, as the prosecutor pointed out, Mr. Buckley did not have the gun. The murder weapon, the prosecutor emphasized, was found "in the possession of this defendant in Henderson, Nevada." Thus, the fact that appellant had possession of the gun the next morning may have been crucial, for it virtually eliminated the possibility that Mr. Buckley or another of appellant's companions could have picked up the gun during the scuffle and shot Mrs. Parsons. Appellant's possession of the gun also supported the inference that he was not merely struggling with Mrs. Parsons for possession of the gun when she was shot

but had the gun in his control. Finally, the prosecutor pointed out that when the gun was found on appellant's person, all six shells had been expended, and since only three shots were fired from this gun in the store, the inevitable inference was that appellant had fired the three remaining shots after his flight from the liquor store and before his arrest. The effect of the testimony of appellant's arrest for vagrancy in another state while in possesion of the murder weapon with three bullets missing was to picture appellant as an evil and violent man.[6]

Both the California District Court of Appeal and the court below concluded that in light of other evidence in the record, the testimony regarding appellant's possession of the murder weapon in Nevada "was not required to establish any element of the crime charged." That is not the test. The question is whether it is "[ ]possible for us to say that the State has demonstrated, beyond a reasonable doubt, that the [admission of the unlawfully seized evidence] did not contribute to [appellant's] conviction[]." *Chapman v. California, supra,* 386 U.S. at 26. In good conscience, we are unable to do so.

The judgment is reversed and the cause remanded to the district court for further proceeding consistent with this opinion.

[6]The prosecutor also argued to the jury that appellant's presence in Nevada soon after the offense was evidence of flight reflecting consciousness of guilt. But as the state court and the court below point out, the arresting officer's knowledge of appellant's presence in Nevada was not the product of either the arrest or the search.

Appendix B

United States District Court
Northern District of California

No. C70-1497 LHB

Lloyd Charles Powell, Petitioner,
vs.
W. T. Stone, Warden, Respondent.

[Filed February 8, 1972]

ORDER

Petitioner, a California state prisoner incarcerated at the Correctional Training Facility, Soledad, California, was convicted of violation of California Penal Code section 187 (second degree murder) following a trial by jury in the Superior Court of San Bernardino County. His conviction was affirmed on appeal by the California Court of Appeal (4/Crim. 3388, unpublished opinion). A petition for a writ of habeas corpus was denied by the California Supreme Court.

On July 15, 1970, petitioner filed a petition for a writ of habeas corpus in this Court (No. C-70 1497 GSL). On September 17, 1970, the late Judge Levin denied the petition. An appeal from this order was dismissed by the Court of Appeals for the Ninth Cir-

cuit on July 15, 1971 (9th Cir. No. 26782). That court gave petitioner leave to file an amended petition in this Court. The present petition was filed on August 24, 1971.

The trial court found petitioner guilty of second degree murder for fatally shooting one Mary Parsons at approximately midnight on February 18, 1968, in San Bernardino, California. Approximately 10 hours later, petitioner and a companion were arrested in Henderson, Nevada, for violation of the local vagrancy ordinance. After the arrest, the arresting officer searched petitioner's person and found a pistol containing six expended cartridges in his coat pocket. At petitioner's trial, expert testimony was admitted which demonstrated that the bullet which killed Mrs. Parsons was fired from this gun.

Petitioner now seeks relief on habeas corpus on the ground that: (1) the ordinance under which he was arrested is unconstitutionally vague and requires a person suspected of violating it to incriminate himself; (2) even if the ordinance is not constitutionally infirm, the officer did not have probable cause to arrest petitioner for violation of it. Petitioner further contends that any error with reference to the admission of the gun or of the arresting officer's testimony concerning the circumstances of the arrest cannot be said to be harmless beyond a reasonable doubt.

Our initial inquiry is whether, if the statute under which petitioner was arrested is unconstitutional, the exclusionary rule would operate to render the fruits of a search incident to the arrest inadmissible at his

trial. The purpose of the exclusionary rule is to discourage illegal police conduct by removing the incentive to disregard the constitutional guaranty against unreasonable searches and seizures. *Mapp v. Ohio,* 367 U.S. 643, 656 (1961); *Elkins v. United States,* 364 U.S. 206, 217 (1960). Evidence seized under such circumstances is not necessarily untrustworthy. In the present case, it does not appear that petitioner was prosecuted for violation of the vagrancy ordinance. He now attacks the product of the search, the gun which was admitted into evidence at his trial in California, and not the arrest itself. The discovery of this evidence was an unforeseen and collateral byproduct of the officer's action in arresting petitioner for violation of the ordinance. The purpose of the exclusionary rule would not be advanced by ex post facto condemnation of an arrest which was apparently valid when made. The statute in question is possessed of sufficient clarity to warrant the arresting officer's conclusion that petitioner had violated it. Therefore, in the absence of a prior determination that the statute was unconstitutional, the officer was entitled to arrest petitioner for violation of it if he had probable cause to believe that the offense had been committed in his presence and to make a reasonable search incident to that arrest.

The facts developed at petitioner's trial show that the arresting officer had probable cause to believe that he had observed petitioner violate the ordinance. The ordinance provides that every person is a vagrant who:

> "Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

At the time of the arrest, the officer was in uniform and was driving a marked police vehicle. He observed petitioner and another man looking at the police unit. After they had observed the police car, they quickly turned and walked rapidly in the opposite direction. As they were walking, they glanced back at the police car. The officer then followed them. They again glanced back at the police car, then split apart and began walking rapidly in different directions. The officer followed petitioner and directed him to halt. Petitioner failed to do so and continued walking rapidly. The officer finally stepped from his vehicle and asked petitioner to stop. Petitioner identified himself by his correct name and told the officer that he had been staying with friends in the Las Vegas area for the past several days and that he was en route to Michigan. Petitioner failed to produce any identification and stated that it had recently been stolen from him. Petitioner was unable to name his friends in Las Vegas or their address. The officer testified that the City of Henderson is not in a direct route from Las Vegas to Michigan. These facts combined to give the officer probable cause to believe that he had observed petitioner violate the ordinance. Accordingly, arrest for violation of the ordinance and a reasonable search incident to that arrest were proper. The gun seized from petitioner's coat during that search was, therefore, properly admitted into evidence at petitioner's trial in California.

In any event, it appears that, even if the admission of the gun and of the arresting officer's testimony into evidence at petitioner's trial constituted error, such error was harmless beyond a reasonable doubt under the rule of *Chapman v. California,* 386 U.S. 18 (1967). The California Court of Appeal, in affirming petitioner's conviction on direct appeal, reached a similar conclusion and thus avoided decision of several of the other constitutional issues presented to it. That court's decision in this respect is, of course, not binding on this Court. *Fay v. Noia,* 372 U.S. 391, 422 (1963). This Court has, therefore, independently reviewed the transcripts of petitioner's trial, which were filed with this Court as exhibits. I find that these transcripts are sufficient to serve as a basis for determination of the issues presented. 28 U.S.C. § 2254. Having read and considered these transcripts, I conclude that any error concerning the above evidence was harmless error under the *Chapman* test. It clearly appears from independent evidence adduced at the trial to which no objection has been made that petitioner was present at the scene of the shooting and became embroiled in an argument with the decedent and her husband. Two witnesses testified that he was in possession of the gun immediately before the fatal shot was fired. No evidence to the contrary was pre-

sented. Petitioner's presence in Nevada a short time after the shooting could be construed as evidence of flight. Any irregularities surrounding the arrest and search would not taint the testimony of the two witnesses who observed him in Nevada on the morning following the shooting. Thus, petitioner's possession of the gun at the time of the commission of the offense was conclusively proven without recourse to any inferences which could have been drawn from his later possession of the gun in Nevada. As noted by the California Court of Appeal, petitioner's possession of the gun in Nevada was not required to establish any element of the crime charged. I therefore find that any possible error committed in the admission into evidence of the gun or the arresting officer's testimony was harmless beyond a reasonable doubt.

It is therefore .

ORDERED that the petition for writ of habeas corpus be denied, that the order to show cause heretofore issued be discharged, and that the proceedings be dismissed.

Dated: Feb. 8, 1972

Lloyd H. Burke

United States District Judge

Appendix C

CERTIFIED FOR NONPUBLICATION

In the Court of Appeal
State of California
Fourth Appellate District

DIVISION TWO

4 Criminal No. 3388

People of the State of California,
Plaintiff and Respondent,
vs.
Lloyd Charles Powell,
Defendant and Appellant.

[Filed Oct. 7, 1969]

OPINION

APPEAL from a judgment of conviction of violation of Penal Code, § 187 (Murder), entered in the Superior Court in and for the County of San Bernardino. Edward P. Fogg, Judge. Judgment affirmed.

Richard R. Beswick, under appointment by this Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Jeffrey T. Miller, Deputy Attorney General, for Plaintiff and Respondent.

In an information filed by the district attorney for the County of San Bernardino on March 8, 1968, defendant Powell was charged with a violation of Penal Code, § 187, (Murder). Defendant entered a plea of "Not Guilty," and prior to trial withdrew his reservation of the right to make an additional plea of "Not Guilty by Reason of Insanity." At the conclusion of a jury trial, defendant was found guilty of the crime of murder in the second degree. Defendant waived referral of his action to the probation office for presentence investigation and report, declined the statutory time for sentence, and requested immediate sentence. The court sentenced Powell to imprisonmnt in the state prison for the term prescribed by law. This is an appeal from the judgment.

Defendant does not question the sufficiency of the evidence, therefore, no detailed statement of the facts is necessary. Only that portion of the evidence which is relevant to defendant's contentions will be recited.

In the very early hours of February 18, 1968, the charged crime was committed in a liquor store in San Bernardino County, California. Approximately ten hours later defendant was arrested in the City of Henderson, Nevada, for a violation of its local vagrancy ordinance. After the arrest, defendant was searched and a gund was removed from a pocket in

the jacket which he was wearing. The gun was introduced into evidence in the case now at bench.

On this appeal, defendant attacks the constitutionality of the Henderson, Nevada, ordinance contending it violates the First, Fourth, Fifth and Fourteenth Amendments to the Federal Constitution. It is not necessary for us to determine the constitutionality of the Henderson ordinance or the legality of the Nevada officer's arrest of defendant.

It has been repeatedly and consistently held that the requirements of due process are satisfied if the defendant is given a fair trial, although brought to trial against his will. Even though the arrest was illegal or the extradition proceedings were irregular or defendant was kidnaped in a sister state, the court in which the defendant is present and which has jurisdiction of the charged crime has proper jurisdiction of defendant's person. (*Frisbie v. Collins,* 342 U.S. 519 [72 S.Ct. 509, 96 L.Ed. 541]; *Ker v. Illinois,* 119 U.S. 436 [7 S.Ct. 225, 30 L.Ed. 421]; *People v. Garner,* 57 Cal. 2d 135; *People v. Pratt,* 78 Cal. 345; *People v. Stoliker,* 192 Cal.App. 2d 263; *People v. Sergent,* 183 Cal.App. 2d 342; see Witkin, Crim.Proc., § 46, p. 48.)

Defendant does not contend that officials of the State of California lacked probable cause to have him arrested or extradited, nor does he allege any irregularity in his return to California.

The ramifications of the possible constitutionality of the Henderson ordinance are not entirely resolved

since evidentiary fruits of the arrest were introduced at the trial; the Nevada officer testified as to the arrest, the identification of the defendant and his possession of the murder weapon.

Defendant's presence in Nevada within ten hours of the homicide could be construed as evidence of flight. However, any person in Nevada who saw defendant at or about the time the Nevada officer encountered him could have testified as to identification and his presence in Nevada. Any irregularities surrounding the arrest would not taint the officer's testimony regarding defendant's presence in Henderson. At the trial the Nevada officer also testified that the murder weapon was found in defendant's possession at the time of his arrest. The gun itself was introduced into evidence without objection; defendant cannot question the admissibility of the gun for the first time on appeal. However, defendant did object to the testimony of the Nevada officer concerning the circumstances surrounding the gun's discovery. Although this latter point is different in substance from the former one, in essence the objection raises the issue of whether the method by which the gun was discovered was legal. If the method by which the gun came into the possession of law enforcement officers were impermissible, the taint, if any, might prevent the gun being admissible into evidence.

However, assuming that the objection which was made went to the admissibility of the gun and that it was error to admit the gun into evidence, we cannot find reversible error. The evidence of the events surrounding the commission of the offense clearly places the defendant at the scene of the crime, and identifies him as the person who fired the fatal shot. Even under the stringent test of *Chapman v. California,* 386 U.S. 18 [87 S.Ct. 824], the error was non-prejudicial. The testimony of the Nevada officer, regarding defendant's possession of the murder weapon in Nevada, was not required to establish any essential element of the charged crime.

Mr. Buckley accompanied defendant to the liquor store where the homicide occurred and was present during the time the crime was committed. He testified for the prosecution. Shortly after the events at the County Hospital, Mr. Buckley gave a statement to law enforcement officers. In that statement, Mr. Buckley stated that defendant "shot the manager's wife, and, then, the manager." During his testimony at trial, Mr. Buckley stated he could not say he actually saw the gun in defendant's hand at any time. The prosecution sought to impeach Mr. Buckley with his prior inconsistent statements. No objection to this testimony was entered by defendant in the trial court forum. On appeal, defendant for the first time asserts the prior inconsistent testimony should not have been admitted.

The holdings of *People v. De Santiago,* 71 A.C. 18, and *People v. Pineda,* 253 Cal.App. 2d 443, are dispositive of this contention. The admissibility of evidence of the type here involved will not be reviewed on appeal absent a specific and timely objection at trial. (*People v. Robinson,* 62 Cal. 2d 889, 894; *People*

v. Richardson, 51 Cal. 2d 445, 447; *People v. Kitchens,* 46 Cal. 2d 260, 262.)

Judgment affirmed.

McCabe P.J.

We concur:

Kerrigan J.

Tamura J.

Certified for nonpublication, Rule 976.

McCabe P.J.

Kerrigan J.

Tamura J.